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Nos. 81-14 and 81-416

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS PERAINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ANTHONY BATTISTA AND T. ANTHONY ARNONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence supported the jury's finding that petitioners were engaged in a single conspiracy to distribute an obscene movie in interstate commerce as alleged in the indictment.

2. Whether a national, as opposed to "community," standard is required when a defendant engages in a nationwide conspiracy to distribute a pornographic movie.

3. Whether venue is proper in a district to which a pornographic movie has been transported, even though the defendant, who was an active participant in the conspiracy to distribute the movie, lacked actual knowledge that the movie had been transported to that district.

4. Whether 18 U.S.C. 1462 and 1465 are impermissibly vague in violation of the First Amendment.

5. Whether the evidence supported the jury's finding that the movie "Deep Throat" is obscene.

6. Whether the district court improperly excluded from the record petitioners' educational slides depicting various sexual acts and improperly admitted into the record the government's expert testimony as to possible harmful effects of pornography on some members of society.

7. Whether a grand jury must view a movie before it can conclude that there is probable cause to believe that the movie is obscene.

8. Whether the district court erred in refusing to scrutinize all aspects of the grand jury proceedings once it concluded that the indictment on its face was proper.

9. Whether the district court erred in instructing the jury that contemporary community standards involved what the average person would "accept" as opposed to "tolerate."

10. Whether the district court erred in supplying the jury with two specific examples of how a defendant can demonstrate withdrawal from a conspiracy.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-14

LOUIS PERAINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 81-416

ANTHONY BATTISTA AND T. ANTHONY ARNONE, PETITIONERS

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OPINION BELOW

The opinion of the court of appeals in both No. 81-14 and No. 81-416 (Pet. App. 1a-17a)[1] is reported at 646 F. 2d 237.

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in *Louis Peraino, et al.* v. *United States of America*, No. 81-14.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1981. A petition for rehearing in No. 81-416 was denied on June 12, 1981 (Pet. App. 32a). The petition for a writ of certiorari in No. 81-14 was filed on July 2, 1981, and the petition in No. 81-416 was filed on August 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of conspiracy to violate 18 U.S.C. 1462 and 1465 by conspiring to transport the obscene motion picture film entitled "Deep Throat" in interstate commerce, all in violation of 18 U.S.C. 371. In No. 81-14, petitioner Louis Peraino was sentenced to a three-year term of imprisonment, with all but six months suspended, and he was fined $10,000; petitioner-corporations Gerard Damiano Film Productions, Inc., and Bryanston Distributors, Inc., were each fined $10,000. In No. 81-416, petitioner Anthony Battista was sentenced to two years' imprisonment, suspended to two months, and a $2,000 fine; and petitioner T. Anthony Arnone was sentenced to two years' imprisonment, suspended to five months, and a fine of $3,000. The court of appeals affirmed (Pet. App. 1a-17a).

The evidence showed that in approximately 1971 Gerard Damiano and petitioner Louis Peraino formed petitioner Gerard Damiano Film Productions, Inc. (Damiano Films), a New York corporation, to produce and distribute low budget sex films (J.A. 589-590).[2] One of the "sex" films

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[2] "J.A." refers to the joint appendix that was prepared by the parties for the court of appeals.

produced by the corporation was entitled "Deep Throat."[3] It was directed by Gerard Damiano[4] and produced by petitioner Peraino under the alias "Lou Perry" (J.A. 606, 611, 612, 619).

To facilitate the collection of royalties from the distribution and showing of "Deep Throat", petitioner Peraino used Damiano Films' sister corporation, petitioner Bryanston Distributors, Inc. (Bryanston), a New York corporation whose principal business was the distribution of "horror" movies and other general release films (J.A. 1205-1206). Peraino was the sole owner of Bryanston (J.A. 1202). After the middle of 1973, all royalties from "Deep Throat" were deposited in the Bryanston account and Bryanston paid the taxes of Damiano Films until the latter corporation was phased out in November 1973 (J.A. 953-958; 1034-1037).

Sometime during 1973, the distribution center for "Deep Throat" shifted from New York to Florida and a new corporation, AMMA, was created to distribute the film (J.A. 1302-1303). This corporation, which also was known as MGA and Ivanhoe, was owned jointly by petitioner

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[3]The plot of the movie involves an unmarried female, portrayed by Linda Lovelace, who consults a physician, portrayed by Harry Reems, regarding her inability to experience an orgasm during sexual intercourse. Upon examination the doctor discovers that the woman's clitoris is located in her throat instead of her vagina. Therefore, she can be satisfied sexually only through fellatio. The physician hires her as a therapist and sends her on house calls to treat men with sexual problems.

The film contains numerous scenes of fellatio, cunnilingus, vaginal and anal intercourse with male ejaculation. These acts are portrayed in detail, including close-ups centering on the sexual organs (J.A. 264; Pet. App. 36a).

[4]Damiano sold his one-third interest in Damiano Films in the summer of 1972 for approximately $15,000 (J.A. 619, 622). He testified at petitioners' trial under a grant of immunity (J.A. 586).

Arnone, Robert DeSalvo (a fugitive co-conspirator) and Anthony Peraino, petitioner Peraino's brother (J.A. 914, 1309-1315, 1760, 2204, 2215-2216, 2220-2221). In addition, petitioner Battista, who was primarily responsible for the distribution of "Deep Throat" in Pennsylvania, New Jersey and New York, was on AMMA's payroll and was listed as its President (J.A. 1310-1311; 1792-1793; 2204-2205). Tax returns also showed that petitioner Battista had received an automobile from AMMA (J.A. 1359, 1365-1366).

After the move to Florida, AMMA continued to maintain a relationship with petitioner Bryanston. Substantial sums of money were transferred from AMMA to a subsidiary of Bryanston, Haunted House Film Productions, Inc. (J.A. 964-967), and there were numerous telephone calls between officers of AMMA and Bryanston, many of which were placed to petitioner Peraino (J.A. 1606-1608). Indeed, a secretary at AMMA described Bryanston as an office of AMMA (J.A. 1762-1764, 1768). Moreover, prints of the film "Deep Throat" were sent from AMMA in Florida to Bryanston Distributors in New York (J.A. 1920-1921).[5]

Sometime in 1973, AMMA's office was moved from Plantation, Florida, to Wilton Manors, Florida, but petitioner Arnone did not move to the new location (J.A. 884-888; 896-897, 911). Apparently he and Robert DeSalvo

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[5]The corporate relationships are complex, but reveal a common enterprise as illustrated by the testimony of Pat Baca, the exhibitor of the film "Deep Throat" in Albuquerque, New Mexico. He originally paid royalties to petitioner Damiano Films from May 7, 1973, until April 1974. He then paid them to MGA, which was an alias for AMMA, from October to November 1973. He then paid directly to AMMA from November 26, 1973, to April 1974; and then to American Films from April to December 1974 (J.A. 830-836). The cancelled checks to Damiano Films revealed that they had been deposited to the account of petitioner Bryanston Distributors, Inc. (J.A. 957-958)

had a disagreement over how to run the operation (J.A. 1931). Arnone did continue, however, to exhibit the film in Florida (J.A. 1932).

With regard to the distribution of the movie, the evidence showed that prior to this Court's decision in 1973 in *Miller* v. *California*, 413 U.S. 15, "Deep Throat" was distributed in the same way as any other motion picture film, with prints stored at a film warehouse and shipped by common carrier to regional subdistributors or directly to theatre owners in various parts of the United States on the order of Damiano Films (J.A. 650-658). After *Miller*, prints generally were left in the states where they already were located, but, if the potential royalties seemed large enough, petitioners nevertheless risked shipping them in interstate commerce (J.A. 721-722, 788). This generally was accomplished by hiring "checkers" whose jobs were to carry prints of the film across state lines to theatres, count the number of people entering the theatres, collect the royalties from the theatre owners, and mail the receipts to petitioners or their co-defendants (J.A. 890-891, 907, 1144-1147).

Two stipulations by the parties clearly linked the conspiracy to the Western District of Tennessee. First, in October 1973, James Newman, an employee of Ivanhoe and AMMA, carried two prints of "Deep Throat" from Florida to Memphis, Tennessee, on instructions from Robert DeSalvo who was a co-partner in AMMA with petitioner Arnone. Newman left these prints in his hotel room and they were seized by FBI agents pursuant to a search warrant (J.A. 1573-1575). Second, in February 1974, an agent of AMMA and/or its successor corporation, American Films, made arrangements for "Deep Throat" to be exhibited in the Paris Theatre in Memphis. The movie was exhibited from February 21, 1974, through March 9, 1974 (J.A. 1157-1160).

On August 15, 1974, a federal grand jury in Memphis, Tennessee, returned a one-count indictment against all of

the petitioners, except Bryanston, and others for conspiring to violate 18 U.S.C. 1462 and 1465, by transporting "Deep Throat" in interstate commerce. This indictment was superseded on June 13, 1975, by an indictment issued by a new grand jury which recharged the above persons, added new defendants, including Bryanston, and added a substantive count against all of the defendants of knowingly transporting an obscene movie in violation of 18 U.S.C. 1465 and 2 (Pet. App. 3a-5a; J.A. 38-53).[6]

After pretrial motions had been disposed of, a jury trial was begun on March 1, 1976. On April 30, 1976, the jury found all the defendants guilty of conspiracy and some defendants, including petitioner Damiano Films, guilty of the substantive offense.

On appeal, the Sixth Circuit reversed the convictions of all defendants who had been sentenced because the instructions to the jury violated this Court's then-recent decision in *Pinkus* v. *United States*, 436 U.S. 293 (1978). The court of appeals remanded for new trials.

Prior to the re-trial the government dismissed the substantive count against all of the defendants and proceeded to trial only on the conspiracy count. The retrial of the petitioners and co-defendants lasted approximately seven weeks, with the United States calling 32 fact witnesses and one expert witness on the issue of whether the film was obscene as judged by contemporary community standards. The film was viewed by the jury at a local theatre in Memphis, Tennessee. Petitioners' proof consisted largely of expert witnesses and dealt with whether the movie "Deep Throat" was obscene.

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[6]Anthony Peraino, Robert DeSalvo and AMMA Corporation, who had been arraigned under the prior indictment, failed to appear as directed for their arraignments for the superseding indictment. They were tried *in absentia* for conspiracy as charged in the original indictment and found guilty. They have not, however, been sentenced.

During the course of the trial and prior to the court's charge to the jury, it was agreed and stipulated by all parties that a *Roth-Memoirs*[7] standard of obscenity incorporating the "benefits" of *Miller*[8] would be charged to the jury (J.A. 265). Subject to certain conditions in the written stipulation, the test agreed upon was as follows (J.A. 265-266):

A. Whether the average person, applying contemporary community standards, would find that the movie, taken as a whole, appeals to the prurient interest in sex; and,

B. Whether the movie is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters because it depicts or describes in a patently offensive way sexual conduct, that is:

(1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(2) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals; and

C. Whether the movie is utterly without redeeming social value.

After three days of deliberation, the jury found all five petitioners guilty (J.A. 270-275).

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[7]This refers to the standards for judging obscenity announced by this Court in *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

[8]This refers to this Court's decision modifying the standards for judging obscenity in *Miller* v. *California*, *supra*.

The court of appeals affirmed (Pet. App. 1a-17a).[9] It held that the grand jury proceedings had been proper and that, because the indictment was valid on its face, it had been unnecessary for the district court to probe into the grand jury proceedings at all (*id.* at 6a). It found ample evidence in the record to support the jury's findings on both conspiracy and obscenity (*id.* at 7a, 9a). It also concluded that the district court had committed no errors with regard to petitioners' objections to the admissibility of evidence (*id.* at 11a) or the instructions to the jury (*id.* at 12a-15a).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Moreover, the judgment upholding the convictions of these five petitioners is correct. Accordingly, further review by this Court is not warranted.

1a. Petitioners in both petitions (81-14 Pet. 16-20; 81-416 Pet. 10-14) argue that there never was a national conspiracy to violate the obscenity laws and that the evidence showed at most a series of small, discrete conspiracies to distribute "Deep Throat" regionally. Petitioners thus claim that there was a fatal variance between the indictment and the proof at trial.

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[9]The Sixth Circuit wrote a separate opinion reversing the convictions of two of petitioners' co-defendants, Joseph Peraino and Plymouth Distributors, Inc. (645 F. 2d 548; Pet. App. 18a-30a). The court found that these defendants had joined the conspiracy after all overt acts in the Western District of Tennessee had been committed (*id.* at 19a). Also, it found that no overt acts were committed in any jurisdiction where the movie was regarded as obscene after these two defendants joined in the conspiracy (*id.* at 24a). In light of the potential First Amendment problems (*id.* at 23a-24a), the court concluded that, as to them, venue in the Western District of Tennessee was improper. This holding is discussed further at pages 11-12, *infra*.

The court of appeals correctly found, however, "that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce" and that this single "conspiracy did not relate to merely one shipment to a particular place but was national in scope and related to many shipments made to different states" (Pet. App. 9a).

The jury was specifically instructed that if it found that more than one conspiracy existed, it was required to acquit all of the defendants (J.A. 2649). Although there was little direct evidence of a single agreement to distribute the movie "Deep Throat," the abundant circumstantial proof was easily sufficient to support the jury's verdict that only a single conspiracy existed. Petitioner Peraino and his brother, Anthony, participated, in one way or another, with every corporate entity that engaged in any substantial effort to distribute "Deep Throat" for exhibition.[10] Thus, it was quite reasonable for the jury to conclude that the operation moved from New York to Florida in furtherance of petitioners' scheme and then branched out through other conspirators with a singular purpose to distribute more widely this particular film. The fact that money passed freely among the various distributing corporations and their subsidiaries is persuasive evidence of a single, continuing scheme to profit from the nationwide distribution of the movie.

1b. Petitioners' related argument (81-14 Pet. 20; 81-416 Pet. 10-11) is that when a nationwide conspiracy to distribute an obscene movie is alleged, a national, as opposed

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[10]The government's view is that Anthony Peraino, petitioner Peraino's brother, was the central character in the conspiracy. He was involved in the making of the movie and in its distribution through Damiano Films. He was also the "boss" of AMMA and American Films once they assumed control of the distribution of the movie. He received substantial sums of money from these corporations derived from the nationwide distribution of this single film.

to community, standard for obscenity is required by the First Amendment. First, it is not at all clear why the obscenity standard stipulated to by the parties prior to trial—which expressly incorporates the "contemporary community standard" (J.A. 265)—does not bar petitioners' argument. Second, the same basic argument was rejected by this Court in *Hamling* v. *United States*, 418 U.S. 87, 104-106 (1974), with regard to prosecutions for the substantive offense of distributing an obscene movie in interstate commerce. See also *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130 (1973). The Court in *Hamling* held:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.

Hamling v. *United States, supra*, 418 U.S. at 106. Petitioners have suggested no reason why the same result should not obtain when the crime charged is conspiracy to distribute rather than actual distribution of obscene materials. The court of appeals' decision affirming the use of community standards in this case is correct.

1c. Petitioners make a more substantial objection in suggesting (81-14 Pet. 17-20; 81-416 Pet. 11-24) that it is inappropriate to subject everyone involved in a national conspiracy to distribute a pornographic movie to the contemporary community standards of the Western District of Tennessee and therefore venue in that district was improper. In an ordinary conspiracy case, venue is proper against all of the conspirators either in the district of the conspiracy's formation or in the district where any overt act in furtherance of the conspiracy takes place and this is so regardless of whether all of the conspirators participated in the act that serves as the basis for venue. *Hyde* v. *United States*, 225

U.S. 347 (1912); *Brown* v. *Elliott*, 225 U.S. 392 (1912); 18 U.S.C. 3237(a). See generally Developments, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 975-978 (1959). The theory is that if someone embarks upon a wide ranging criminal venture then he takes his chances as to where he might be prosecuted. See *United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944) (L. Hand, J.).[11]

To be sure, this rule makes much more sense when the object of the conspiracy is the distribution of heroin, which is illegal everywhere, than it does when the object is pornography which may be constitutionally protected under the community standards of some localities. Nonetheless, the Sixth Circuit has held that "[o]nce the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants have no right to have the obscenity of the film tried according to the community standards of other localities * * *." *United States* v. *Sandy*, 605 F. 2d 210, 217, cert. denied, 444 U.S. 984 (1979). See also *United States* v. *Friedman*, 506 F. 2d 511, 516 (8th Cir. 1974).

Petitioners argue (81-14 Pet. 17-20; 81-416 Pet. 24-25) that the decision in the instant case relating to them conflicts with the Sixth Circuit's opinion overturning on improper venue grounds the convictions of two of their co-defendants. *United States* v. *Peraino*, 645 F. 2d 548 (6th Cir. 1981) (Pet. App. 18a-30a). In *Peraino* the court held that defendants could not be tried in Memphis because they had not joined the conspiracy until after all overt acts in the Western District of Tennessee had been committed. In addition, there was no evidence that the two defendants had

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[11]Recognizing the possibility of inconvenience to defendants occasioned by this rule, this Court noted in *Hyde* that it is preferable that "conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs." *Hyde* v. *United States*, *supra*, 225 U.S. at 363.

furthered the conspiracy in any locality where "Deep Throat" was allegedly obscene under community standards. The court therefore held that First Amendment concerns made it improper for them to be tried in Memphis (Pet. App. 22a-23a).

Even assuming the Sixth Circuit is correct—a point the government does not concede—that it is inappropriate in an obscenity case to apply the general rule that anyone who joins a conspiracy is responsible for all actions in furtherance of the conspiracy that occur prior to the time of joining, this holding does not assist petitioners. All the Sixth Circuit requires is a careful scrutiny of the nexus between the overt act that supports venue and the defendant. Only where no connection exists is venue inappropriate. All five petitioners, however, were sufficiently connected to the distribution into Memphis of the movie "Deep Throat" to support venue.

As to the three petitioners in No. 81-14, their role in the nationwide distribution of the movie would have supported trial in any location where the movie was introduced through the normal channels they established and perpetuated. The parties stipulated that the movie was shipped to Memphis by AMMA Corporation. AMMA was the successor to petitioners Damiano Films and Bryanston in the general distribution of the movie. The latter two corporations continued to benefit directly from the nationwide distribution of the film, which obviously included shipment to Memphis. Since the petitioner corporations placed the movie into the general stream of commerce and benefited financially from its distribution, they cannot complain about being prosecuted in a locality where the movie is found to be obscene. See *Hamling* v. *United States, supra,* 418 U.S. at 106.

The same reasoning applies equally to petitioner Peraino. He was the sole owner of Bryanston and Damiano Films

and played a significant role in the national distribution of "Deep Throat." Although he suggests that his role ended once the operation moved to Florida, the overwhelming evidence, involving numerous phone calls and exchanges of money, demonstrates that petitioner Peraino played a significant, continuing role in the general distribution of "Deep Throat" throughout the period of the conspiracy. Thus, venue over him in Memphis was perfectly proper. *Hamling* v. *United States*, *supra*, 418 U.S. at 106.

Petitioners in No. 81-416 present closer cases because they were less involved in the general distribution of the movie. They were, however, more involved with AMMA than they admit in their petitions. Petitioner Battista did not simply distribute in Delaware, New Jersey and Pennsylvania (Pet. 14). He was at least the titular President of AMMA and received money and a car from the corporation. Thus petitioner Battista was involved as a principal actor with the corporation that shipped "Deep Throat" in interstate commerce. He therefore knew or should have known that his corporation was distributing "Deep Throat" in localities where it might be considered obscene. This involvement is sufficient to support venue in the Western District of Tennessee.

Similarly, petitioner Arnone was not simply an exhibitor in Florida (Pet. 14), but rather was one of the managing partners of AMMA. He therefore benefited financially from the general distribution of that movie. Indeed, it was his partner, Robert DeSalvo, who ordered the movie sent to Memphis. Whether petitioner actually knew of this decision is irrelevant. He joined the conspiracy knowing its object was to ship a pornographic movie to exhibitors across the nation and therefore was properly prosecutable in any district where the movie was sent by AMMA, including Memphis.

Thus, even if the Court were inclined to regard as potentially important the issue of the relationship between the First Amendment and venue for conspiracy to violate the obscenity laws, this case involving defendants who were intimately related to the conspiracy as it extended to Memphis, Tennessee, is not an appropriate vehicle for resolving the issue.[12]

2a. Petitioners in No. 81-14 (Pet. 32-34) contend that 18 U.S.C. 1462 and 1465 are unconstitutionally vague both on their face and as applied in this case. Petitioners acknowledge (Pet. 32) that in *Marks* v. *United States*, 430 U.S. 188 (1977); *Miller* v. *California*, *supra*, 413 U.S. at 23-25; and *United States* v. *12 200-Ft. Reels of Film*, *supra*, 413 U.S. at 130 & n.7, this Court has upheld the federal obscenity statutes under the same First Amendment attacks. They nonetheless "persist" in their contention. No reason is offered, nor is any available, why the Court ought to reconsider its prior holdings.

Petitioners offer (Pet. 33-34) a novel theory with regard to the constitutionality of the statute as applied to this case. They point out that this Court, when it modified the obscenity standards to eliminate the "utterly without redeeming social value" test, quoted Justice Harlan's comment that he

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[12]Petitioners Arnone and Battista also complain (81-416 Pet. 23) that the court of appeals improperly defined the knowledge of the movie that the government was required to prove to convict them. The district court charged that the government must prove "knowledge as to the nature and character of the contents of the film, 'Deep Throat' " (J.A. 2680). The court of appeals held that the scienter required is "the general nature and character of the film" (Pet. App. 7a). Petitioners argue that this is inconsistent with *Hamling* v. *United States*, *supra*, 418 U.S. at 123, which requires knowledge of the nature, character and "contents" of the movie. Petitioners' argument is frivolous. Obviously, it is the nature and character of the contents of the movie that the Sixth Circuit was referring to. Moreover, the district court's instruction included the magic word "contents," and, accordingly, there was no error affecting the verdict.

doubted whether the test had any meaning at all. *Miller* v. *California, supra,* 413 U.S. at 22 (quoting *Memoirs* v. *Massachusetts, supra,* 383 U.S. at 459). Petitioners conclude that if the test applied to them had no meaning, then it could not possibly have given them notice of what was illegal and therefore is unconstitutionally vague.

Obviously, petitioners have turned Justice Harlan's point on its head. His statement was made in arguing in favor of a looser standard for "redeeming social value," such as that ultimately adopted in *Miller*. His view was that the test, if anything, was too clear in that it made only the most hard-core pornography subject to governmental regulation. As the court stated in *Hamling* v. *United States, supra,* 418 U.S. at 116:

> [W]e rejected the *Memoirs* "social value" formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to "prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge" and not constitutionally required.

The fact that most materials would be protected under the *Memoirs* test, but that petitioners' movie was not, indicates less that the statute is vague than it does that the movie is unusually offensive.

2b. Petitioners' next argument (81-14 Pet. 25-32; 81-416 Pet. 16-20) is related to the previous one. They assert that, given the strictness of the *Roth-Memoirs* test for obscenity, it was impossible for the jury to find this movie obscene. We note initially that the issue of what is obscene under *Roth-Memoirs* is hardly an issue of general significance in light of the modification of those standards announced in the more recent *Miller* decision. It seems very unlikely that there will

be many more prosecutions under the old standards. Moreover, the issue is essentially a factual one that has been resolved by a jury after viewing the movie (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 (1973)) and upheld by the court of appeals, which has "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction." *Hamling* v. *United States, supra*, 418 U.S. at 124. As the description of the movie (page 3 note 3, *supra*) illustrates, "Deep Throat" is not a movie like "Carnal Knowledge," at issue in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), where the Court felt compelled to overturn the jury's verdict because it did not depict any ultimate sexual acts. It is hard-core pornography and therefore a proper subject for a jury determination as to whether it violates community standards or has any redeeming social value. Review of those decisions by this Court is unwarranted.

3. Petitioners claim (81-14 Pet. 26, 28; 81-416 Pet. 16, 18) that the district court committed reversible error by allowing the government's witness to testify regarding the "harmful effects" of pornography and by refusing to allow a defense witness to show slides of various heterosexual acts that he regularly used in sex education programs in Memphis. This Court has recognized in a previous obscenity case that "the District Court ha[s] wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling* v. *United States, supra*, 418 U.S. at 108.

One of the petitioners' arguments at trial was that the movie, "Deep Throat," encouraged a healthy interest in sex (81-416 Pet. 17) and therefore ought not to be regarded as offensive or without redeeming social value. The testimony on "harmful effects" of pornography in general and "Deep Throat" specifically was designed to rebut those claims. The district court's decision to admit the evidence therefore was not error. For the same reasons, it was not error for the

district court to refuse to instruct the jury that it should disregard any possible harmful effects caused by "Deep Throat."

Nor was it error for the district court to refuse to admit petitioners' offer of "educational slides" as "comparable materials" evidence. After a lengthy hearing involving *voir dire* of the witness and culminating with the district court viewing the slides, the court found the slides not to be comparable to the movie "Deep Throat" (J.A. 2387-2438). Therefore, it held that they were not relevant to the issue of community standards. The district court's decision to exclude these slides as evidence was no abuse of discretion, as the court of appeals correctly found (Pet. App. 12a). *Hamling* v. *United States, supra,* 418 U.S. at 127.

4. Petitioners next contend (81-14 Pet. 21-25; 81-416 Pet. 14-16) that their First and Fifth Amendment due process rights were violated because of the way the grand jury proceedings were conducted, coupled with the district court's ruling preventing them from demonstrating that the grand jury indicted them on an inadequate factual basis. Specifically, petitioners first argue that it is per se impermissible for a grand jury to return an obscenity indictment without viewing the questioned film. Second, they argue that since the grand jury did not view the movie, the courts erred by not inquiring in detail into the grand jury proceedings to determine whether an adequate description of the film was provided.

The proof of the sexual content of the movie presented to the 1975 grand jury[13] was the sworn testimony of an FBI

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[13]This was the third grand jury convened to investigate petitioners' activities with regard to the distribution of "Deep Throat," and the second one to return an indictment based on a finding that the movie was obscene (J.A. 2952-2954). The first two grand juries traveled to a theatre in Memphis to view the movie but the second jury watched only for ten to fifteen minutes before the members decided they had seen

agent who had witnessed the film and taken meticulous notes.[14] He described the movie scene-by-scene for over thirty minutes. The grand jury foreman, who had seen the movie, "couldn't think of anything that wasn't included" (J.A. 3000). While this evidence clearly would not have been sufficient at trial, the fact that it was not the best evidence available does not undermine a grand jury finding of probable cause. See *Costello* v. *United States*, 350 U.S. 359, 363 (1956). This is especially so where, as here, members of the grand jury had independently seen the movie and verified that the description was accurate. Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959).

Nor was there reason for the district court to require the prosecutor to make a more extensive showing as to what transpired before the grand jury. Both the district court and court of appeals found that this indictment was valid on its face. In such a situation this Court has made clear that the indictment "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (citing *Costello* v. *United States, supra; Holt* v. *United States*, 218 U.S. 245 (1910)). Thus, to the extent there was any error, it was committed when the district court breached the secrecy of the grand jury by requiring the foreman to testify, even though petitioners had made no particularized showing of need to invade the processes of

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enough (*ibid.*). Although the record is not clear, it appears the government chose to describe the movie to the third grand jury to save the time and expense required to take the grand jury to a movie theatre to view a film for potentially as short a period as ten minutes.

[14]The district court conducted a hearing to ascertain what evidence had been presented to the jury. One of the witnesses was the foreman of the 1975 grand jury (J.A. 2979-3006).

the grand jury. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681-682 (1958). Since this error benefited petitioners, however, it obviously was harmless.

5. Petitioners Arnone and Battista contend (81-416 Pet. 20-23) that the district court erred in declining to charge the jury that contemporary community standards should be judged by what the community would "tolerate" as opposed to "accept" or "approve." The district court instructed the jury on community standards in the following terms (J.A. 2669):

> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept.

The court of appeals (Pet. App. 12a-15a) upheld the instruction as an accurate statement of the appropriate standard and as consistent with the emphasis in this Court's decision in *Miller* v. *California, supra,* and *Jenkins* v. *Georgia, supra,* on the "average person." The court of appeals basically held that use of "tolerance" might focus the jury's attention more on individual groups in the community rather than on the average person. This holding is consistent with this Court's approach to obscenity and does not conflict with any decision of any other court. Thus, even though the Court has not expressly decided this issue, there is no need to take it up in this case.[15]

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[15] *Smith* v. *United States*, 431 U.S. 291 (1977), relied upon by petitioners (81-416 Pet. 21), holds that federal standards and not state standards control the substantive content of the federal obscenity laws, which effectively makes irrelevant petitioners' claim that under Tennessee law the standard might have been what the community would tolerate as opposed to accept.

The other cases cited by petitioners deal with the standards under state obscenity laws. Obviously, each state is permitted to adopt any

6. Finally, petitioner Arnone contends (81-416 Pet. 25-28) that the district court's instruction on withdrawal from the conspiracy was erroneous and constituted reversible error. He argues (Pet. 26) that the two examples of withdrawal that the district court incorporated into the withdrawal instruction were unduly limiting and tended to make the jury "believe that only such dramatic conduct will constitute relevant evidence of withdrawal" in violation of this Court's ruling in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

The instruction in its entirety was as follows (J.A. 2650-2651):

> A defendant claiming that he has withdrawn from any conspiracy which the prosecution may have proven him to be a part, must show, in order to sustain the claim of withdrawal, that he has either taken some affirmative action to disavow or defeat the purpose of the conspiracy, or has taken some definite and decisive step to disassociate himself fully and completely from the conspiracy. For example, a defendant may withdraw by making a clean breast to the authorities, or by communicating to his co-conspirators his abandonment of the conspiracy by some effective means. A mere end to activity is not enough.

This instruction does not violate *United States Gypsum Co.* In that case the Court made a special point of focusing on the fact that the instruction presented the examples in an

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appro. h it chooses, consistent with the Constitution, to regulate obscenity within the state. The fact that some prefer to consider what the community will "tolerate" as the better approach as a matter of policy is in no way inconsistent with the Sixth Circuit's decision that what the community will accept is most consistent with the "average person" standards enumerated in *Miller* v. *California, supra.*

"either/or" form (438 U.S. at 463-464) and therefore "limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.* at 464. In the instant case, the instruction properly indicated that petitioner was required to prove some "affirmative action" (J.A. 2650) and simply provided the jury with explanatory illustrations. The jury was not precluded from considering any theory of withdrawal petitioner might offer involving other, more or less dramatic, affirmative acts. The instruction read in its entirety is not inconsistent with *United States Gypsum Co.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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